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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-77137; File No. SR-NASDAQ-2015-144]

February 12, 2016

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Order Granting Approval of Proposed Rule Change to Amend Rules 5810(4), 5810(c), 5815(c) and 5820(d) to Provide Staff with Limited Discretion to Grant a Listed Company that Failed to Hold its Annual Meeting of Shareholders an Extension of Time to Comply with the Annual Meeting Requirement

I. Introduction

On December 9, 2015, The NASDAQ Stock Market LLC (“NASDAQ” or “Exchange”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1)¹ of the Securities Exchange Act of 1934 (“Act”),² and Rule 19b-4 thereunder,³ a proposed rule change to provide staff of NASDAQ’s Listing Qualifications Department (“Staff”) with limited discretion to grant a listed company, that failed to timely hold its annual meeting of shareholders, a certain period of time to comply with the annual meeting requirement.⁴ The proposed rule change was published for comment in the Federal Register on December 30, 2015.⁵ The Commission received no comments on the proposed rule change. This order approves the proposed rule change.

¹ 15 U.S.C. 78s(b)(1).

² 15 U.S.C. 78a.

³ 17 CFR 240.19b-4.

⁴ As described in more detail below, the total amount of time a listed company that fails to hold an annual meeting of shareholders can remain listed on the Exchange will not be changing under the proposed rule change.

⁵ See Securities Exchange Act Release No. 76731 (December 22, 2015), 80 FR 81573 (“Notice”).

II. Description of the Proposed Rule Change

Companies listed on the Exchange must comply with various continued listing requirements, one of which is to hold an annual meeting no later than one year after the end of the company's fiscal year.⁶ Currently, if an Exchange-listed company fails to hold its annual meeting, Staff has no discretion to allow additional time for the company to regain compliance. Instead, Staff is required to issue a Delisting Determination, subjecting the company to immediate suspension and delisting, unless the company appeals the Delisting Determination to the Hearings Panel.⁷ The only other Exchange rules where a listed company is subject to immediate suspension and delisting is when a company fails to timely solicit proxies and when the Staff determines that the company's continued listing raises a public interest concern.⁸ For all other deficiencies under the NASDAQ Listing Rules, a listed company is provided with either the opportunity to submit a plan to regain compliance or given a fixed cure period to regain compliance.⁹

⁶ Each company listing common stock or voting preferred stock, and their equivalents, must hold an annual meeting of shareholders no later than one year after the end of the company's fiscal year and solicit proxies for that meeting. See Exchange Rules 5620(a) and (b), respectively. The proposed rule change will also apply to Exchange listed companies that are limited partnerships required to hold an annual meeting. A company that is a limited partnership is not be required to hold an annual meeting of limited partners unless required by statute or regulation in the state in which the limited partnership is formed or doing business or by the terms of the partnership's limited partnership agreement. See Exchange Rules 5615(a)(4)(D) and (F); see also Notice, supra note 5, at 81573 n.3.

⁷ See Exchange Rule 5810(c)(1). A listed company may request review of a Staff delisting determination by a Hearings Panel. See Exchange Rule 5815. A timely request for a hearing will stay the suspension and delisting pending the issuance of a written Panel Decision. See Exchange Rule 5815(a)(1)(A).

⁸ See Exchange Rule 5810(c)(1); see also Notice, supra note 5, at 81573.

⁹ See Exchange Rules 5810(c)(2) and (3); see also Notice, supra note 5, at 81573. Generally, a listed company is allowed 45 calendar days to submit a plan of compliance for certain deficiencies set forth in Exchange Rule 5810(c)(2)(i)-(iii). Upon review of the

The Exchange asserted in its filing that there are a variety of mitigating reasons why a listed company may fail to timely hold an annual meeting of shareholders.¹⁰ For example, the Exchange states that it has observed cases where a listed company was required to reschedule the annual meeting after the meeting's deadline in order to provide its shareholders more time to review proxy materials in connection with a shareholder proxy contest.¹¹ The Exchange also stated that it had encountered listed companies that could not hold an annual meeting because the company was delinquent in filing periodic reports and, as a result, could not include the required financial information in a proxy statement.¹²

Accordingly, the Exchange has proposed to amend Exchange Rules 5810(4), 5810(c), 5815(c) and 5820(d) to provide listed companies that fail to hold a timely annual meeting with the ability to submit a plan of compliance for Staff's review.¹³ In its filing, the Exchange proposed to amend Exchange Rule 5810(c)(1) by deleting the language that a failure of a listed

plan, Staff may grant the company up to 180 calendar days from the date of Staff's initial notification of the company's non-compliance to regain compliance. See Exchange Rule 5810(c)(2)(A) and (B); see also Exchange Rule 5810(c)(2)(F), which provides a company 60 calendar days to submit a plan to regain compliance for filing deficiencies. If upon review of the company's plan Staff determines that an extension is not warranted, Staff will issue a Delisting Determination, which triggers the company's right to request review by a Hearings Panel. See Exchange Rule 5815; see also Exchange Rule 5810(c)(2)(F).

¹⁰ See Notice, supra note 5, at 81573.

¹¹ See Notice, supra note 5, at 81573-74.

¹² See Notice, supra note 5, at 81574. Under the current rules, the Exchange states that a listed company could receive an extension of time to regain compliance with the periodic filing requirement. However, if during any such compliance period the company subsequently fails to hold an annual meeting of shareholders for any reason, Staff would be required to immediately issue a Delisting Determination for both the periodic filing delinquency and the annual meeting deficiency, notwithstanding that the extended compliance period for the periodic filing delinquency has not expired. See Rule 5810(c)(2)(A); see also Notice, supra note 5, at 81574.

¹³ See Notice, supra note 5, at 81574.

company to timely hold its annual shareholders' meeting results in an immediate suspension and delisting. The Exchange also proposed to amend Exchange Rule 5810(c)(2)(A)(iii) by including references to Exchange Rules 5620(a) (Meeting of Shareholders) and 5615(a)(4)(D) (Partner Meetings of Limited Partnerships) under the list of deficiencies for which a listed company may submit a plan of compliance for Staff review.

Under proposed Exchange Rule 5810(c)(2)(G), in the case of deficiencies from the annual meeting requirements of Exchange Rules 5620(a) and 5615(a)(4)(D), Staff's notice shall provide the listed company with 45 calendar days to submit a plan to regain compliance with these provisions; provided, however, that the company shall not be provided with an opportunity to submit such a plan if review of a prior Staff Delisting Determination with respect to the company is already pending.¹⁴ In determining whether to grant the company an extension to comply with the annual meeting requirement, and the length of any such extension, Staff will consider certain factors, which should be addressed in the company's compliance plan, including the likelihood that the listed company would be able to hold an annual meeting within the exception period, the company's past compliance history, the reasons for the failure to timely hold an annual meeting, corporate events that may occur within the exception period, the company's general financial status, and the company's disclosures to the market.¹⁵ Under proposed Exchange Rule 5810(c)(2)(G), Staff would be limited to grant an extension upon review of the compliance plan, to no more than 180 calendar days from the deadline to hold the

¹⁴ See proposed Exchange Rule 5810(c)(2)(G)(i). The Exchange also proposes that Staff may extend the deadline for up to an additional 15 calendar days upon good cause shown and may request such additional information from the listed company as is necessary to make a determination regarding whether to grant such an extension. See id.

¹⁵ See proposed Exchange Rule 5810(c)(2)(G)(ii). Under this proposal, Staff review on whether to grant additional time to comply will be based on information provided by a variety of sources, which may include the listed company, its audit committee, its outside auditors, the staff of the Commission, and any other regulatory body. See id.

annual meeting. As noted above, the deadline to hold an annual meeting of shareholders is one year after the end of the company's fiscal year.¹⁶ The Exchange is also making other conforming changes to the provisions in Exchange Rule 5810(c)(2)(B) to make clear that annual meeting deficiencies are governed by the new provisions in Exchange Rule 5810(c)(2)(G), rather than the plan review provisions that apply to other deficiencies.

The Exchange also has proposed to amend, in conjunction with the changes described above, Exchange Rules 5815(c) and 5820(d) to limit the maximum length of an extension that a NASDAQ Hearings Panel or the NASDAQ Listing and Hearing Review Council ("Council"), respectively, may grant a listed company for the failure to hold an annual meeting to no more than 360 calendar days from the date of non-compliance.¹⁷ Under the Exchange's current rules, when a non-compliant company receives a Delisting Determination, it may appeal that determination to the Hearings Panel, which can grant an exception from the continuing listed standards (which require compliance with the annual meeting requirement) for a maximum of 180 calendar days from the date of the Delisting Determination,¹⁸ and the company may further appeal an unfavorable Hearings Panel decision to the Council, which can grant an exception from the continuing listed standards for a maximum of 360 calendar days from the date of the Delisting Determination.¹⁹ Therefore, under both the proposed rule change and the current rules,

¹⁶ See proposed Exchange Rule 5810(c)(2)(G)(ii). In its filing, the Exchange noted that it has observed that a substantial majority of listed companies that received delisting notices for failing to hold their annual meetings regain compliance within a six month period. See Notice, supra note 5, at 81574 n.15.

¹⁷ See proposed Exchange Rules 5810(c)(1)(G) and 5820(d)(5).

¹⁸ See Exchange Rule 5815(c)(1)(A). As noted above, an appeal to the Hearings Panel results in an automatic stay of the suspension and delisting.

¹⁹ See Exchange Rule 5820(d)(1).

the total amount of time that a company could remain listed while not in compliance with the annual meeting requirement is 360 calendar days.²⁰

Furthermore, the Exchange proposes to amend Exchange Rule 5810(4) to make clear that a Public Reprimand Letter is not an available notification type for unresolved deficiencies from the standards of Exchange Rules 5250(c) (Obligation to File Periodic Financial Reports), and the annual meeting requirements of Exchange Rules 5615(a)(4)(D), and 5620(a).

Lastly, the Exchange noted in its filing that a listed company that submits a plan of compliance and is not subject to the Exchange's all-inclusive annual listing fee program ("Fee Program") prior to January 1, 2018 will be subject to the \$5,000 compliance plan review fee, in addition to any other fees incurred in the appellate process, whereas a company that has opted-in to the Fee Program will not.²¹

III. Discussion and Commission Findings

After careful review, the Commission finds that the proposed rule change is consistent with the requirements of the Act and rules and regulations thereunder applicable to a national securities exchange.²² In particular, the Commission finds that the proposal is consistent with

²⁰ See Notice, supra note 5, at 81574 (Exchange representing that the total time that a listed company may be granted to regain compliance with the annual meeting requirement is unchanged from the current NASDAQ Listing Rules).

²¹ See Exchange Rule 5810(c)(2)(A). Effective January 1, 2018, all listed companies will be subject to the Fee Program and the \$5,000 fee will no longer be applicable to any company. See Exchange Rule IM-5910-1 and IM-5920-1; see also Notice, supra note 5, at 81574. In addition, all listed companies, regardless of whether they participate in the Fee Program or not, are subject to the \$10,000 fee for each of the review by the Hearing Panel and appeal to the Council set forth in Exchange Rules 5815(a)(3) and 5820(a), respectively. See Notice, supra note 5, at 81574. Listed companies may be subject to these fees at different times depending on if and when they regain compliance. See id.

²² In approving the proposed rule changes, the Commission has considered their impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

Section 6(b)(5) of the Act,²³ which requires, among other things, that the rules of a national securities exchange be designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest; and are not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The development and enforcement of meaningful corporate governance listing standards for a national securities exchange is of substantial importance to financial markets and the investing public, especially given investor expectations regarding the nature of companies that have achieved an exchange listing for their securities. In particular, the Commission believes that the goal of ensuring that listed companies have met their requirement to hold an annual meeting of shareholders under the Exchange's Listing Rules is of critical importance to allow shareholders the ability to exercise their rights to participate in corporate governance matters, such as the election of directors. As a publicly listed company, it is at a company's annual meeting that shareholders will typically exercise their right to vote on such important corporate matters as the election of directors. For these same reasons, it is also important that companies that have failed to timely hold an annual meeting of shareholders do not remain listed on a national securities exchange if such deficiency is not cured in a timely manner.

As discussed above, the Exchange believes that, in some cases, there may be mitigating reasons for why a listed company failed to fulfill its annual meeting requirement, and for which immediate suspension and delisting may not be an appropriate outcome under the circumstances.²⁴ In these cases, the proposed rule change gives Staff discretion to analyze whether the reason for the annual meeting deficiency and the plan to regain compliance merit an

²³ 15 U.S.C. 78s(b)(4).

²⁴ See Notice, supra note 5, at 81575.

exception to immediate suspension and delisting.²⁵ In this regard, the Commission notes that under the Exchange's current rules, a listed company receiving a Staff Delisting Determination for a failure to hold an annual meeting may immediately appeal the determination to a Hearings Panel, which generally results in an automatic stay of the suspension and delisting pending the issuance of a written Panel Decision.²⁶ In practice, it is the Commission's understanding from the Exchange that listed companies will often appeal a suspension and delisting determination for failure to hold an annual meeting in order to receive the automatic stay from the Hearings Panel. As such, the proposed rule change provides Staff with the ability to analyze particular instances of non-compliance with the annual meeting requirement prior to any appeal to the Hearings Panel, and if Staff deems it warranted, allow a non-compliant company to carry out a compliance plan for a limited time that could enable the company to become compliant again without the need to appeal to the Hearings Panel (or Council).

Importantly, the Commission notes that the maximum time allowed by the proposed requirements for a deficient company to remain listed while trying to regain compliance with the annual meeting requirement (360 calendar days) would be the same as the maximum time allowed by the current requirements for a deficient company (that appeals to both the Hearings Panel and Council, and is granted the maximum permitted extensions of time by those adjudicatory bodies) to remain listed while not in compliance with the annual meeting

²⁵ See proposed Exchange Rule 5810(c)(2)(G).

²⁶ See supra note 7. The Commission notes that the proposed factors, set forth in proposed Exchange Rule 5810(c)(2)(G)(ii), that would be used to determine whether to grant an exception for the failure to hold an annual meeting, and the length of any such exception, are substantially similar to the factors used by a Hearings Panel to determine whether to grant a further stay of a Staff Delisting Determination. See Exchange Rule 5815(a)(1)(B).

requirement (also 360 calendar days).²⁷ The difference under the proposed rule change is that, pursuant to Staff's discretion, the non-compliant company may be granted an exception from the continued listed requirements of up to 180 calendar days from the annual meeting deadline (i.e., the first 180-days of the overall 360-day time period) in order to potentially fulfill a compliance plan and avoid a Delisting Determination.²⁸ By contrast, under the Exchange's current rules, since there is no opportunity for a compliance plan, the full 360-day period is spent before the Hearings Panel and the Council, assuming the non-compliant company has appealed its Delisting Determination to both the Hearings Panel and Council and been granted the maximum allowable exceptions from the continued listing requirements by those adjudicatory bodies. In the Commission's view, the fact that the current maximum time period that a company could remain listed while not in compliance with the annual meeting requirement will be unchanged under the proposal suggests that the proposal is reasonably designed to continue to afford adequate protection to investors with respect to companies that fail to hold an annual meeting in the time required under the Exchange rules.

Moreover, the Commission emphasizes that, under the proposal, Staff retains the discretion not to grant an exception from the continued listing requirements to a company that has failed to hold its annual meeting on time. The Commission expects Staff to exercise this

²⁷ Compare proposed Rules 5815(c)(1)(G) and 5820(d)(5) with current rules 5815(c)(1)(A) and 5820(d)(1); see also Notice, supra note 5, at 81574 (Exchange representing that the total time that a listed company may be granted to regain compliance with the annual meeting requirement is unchanged from the current NASDAQ Listing Rules).

²⁸ If the non-complaint company is ultimately unsuccessful in this regard, however, and is issued a Delisting Determination, the Hearings Panel and Council may grant an additional exception only out to 360 calendar days from the annual meeting deadline. In other words, if a non-compliant company receives the full 180-day exception from Staff in order to attempt to carry out a compliance plan but does not regain compliance by the end of that 180-day period and is therefore issued a Delisting Determination, it would only have 180 more days to avail itself of its appeal rights.

discretion carefully and discerningly. Staff's analysis in this regard would include consideration of the factors set forth in proposed Exchange Rule 5810(c)(2)(G)(ii), which the deficient company also would be required to discuss in its compliance plan. The Commission expects Staff to carefully scrutinize these factors when conducting its analysis, and not to grant an exception from the continued listing requirements when Staff believes that such an exception is not warranted or it is unlikely the company will be able to hold its annual meeting within the time permitted. For example, a listed company that demonstrates a history of failures to hold a timely annual meeting could, and most likely should, still be subject to immediate suspension and delisting.²⁹

Additionally, the Exchange rules will continue to provide Staff with the ability to send an immediate Delisting Determination to a deficient company when Staff has determined that, after review of the facts and circumstances of the deficiency, continued listing raises a public interest concern.³⁰ Accordingly, the Commission believes the proposed rule change will continue to enable the Exchange to immediately suspend and delist companies that have failed to hold an annual meeting when the circumstances warrant it, but at the same time will provide the Exchange with flexibility to address instances in which the failure to hold an annual meeting, in the Exchange's discretion, counsels in favor of giving the non-compliant company an opportunity to regain compliance for a limited time period without being subject to immediate suspension and delisting or having to avail themselves of the Hearings Panel process to stay the action. The Commission believes, therefore, that the proposed rule change is designed to protect investors and the public interest, as well as to promote just and equitable principles of trade,

²⁹ See proposed Exchange Rule 5810(c)(2)(G)(ii). The Commission notes that such a company would have a right to appeal the determination to a Hearings Panel, which will generally stay the suspension and delisting.

³⁰ See Exchange Rule 5810(c)(1).

The Commission further notes that, as an additional protection of investors and the public interest, a listed company that receives notification that it is deficient in satisfying the annual meeting requirement will continue to be required to publicly disclose that it has received notification of non-compliance with the annual meeting requirement.³¹ In addition, the Exchange publicly discloses a list of companies that are non-compliant with the continued listing standards and the listing standards with which they failed to comply.³² Furthermore, by making it clear in the proposed rules that a Public Reprimand Letter does not apply to deficiencies from the requirement to hold an annual meeting, the Commission believes that the proposal should benefit the public interest and protect investors by helping to ensure that deficient companies are subject to suspension and delisting for failure to hold an annual meeting and ensures that the only cure under the Exchange rules is for the company to hold its annual meeting.³³ Accordingly, for the foregoing reasons, the Commission believes that the proposed rule change is reasonably designed to further the goals of Section 6(b)(5) of the Act.

The Commission also finds that the proposal is consistent with Section 6(b)(4) of the Act,³⁴ which requires that the rules of an exchange provide for the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using

³¹ See Exchange Rule 5810(b) and IM-5810-1. See also Item 3.01 of Commission Form 8-K, which requires that a registrant disclose any notification from the exchange that maintains its principal listing that the registrant does not satisfy a rule or standard for continued listing on the exchange.

³² See Exchange List of Non-Compliant Companies, available at <https://listingcenter.nasdaq.com/NonCompliantCompanyList.aspx>.

³³ Exchange Rule 5805(j) defines a “Public Reprimand Letter” as a letter issued by Staff or a written decision of an Adjudicatory Body in cases where the listed company has violated an Exchange corporate governance or notification listing standard (other than one required by Rule 10A-3 of the Act) and Staff or the Adjudicatory Body determines that delisting is an inappropriate sanction.

³⁴ 15 U.S.C. 78s(b)(5).

its facilities. Specifically, the Commission believes that assessing the \$5,000 compliance plan review fee for deficiencies from the annual meeting requirement on listed companies that have not opted-in to the Fee Program is reasonable and equitably allocated because it is the same fee that is charged for other deficiencies that allow for the submission of a plan of compliance.³⁵ Furthermore, the Commission believes that assessing different fees between listed companies that elect to participate in the Fee Program and those that do not are consistent with the approach allowed when the Fee Program was adopted.³⁶

IV. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act³⁷ that the proposed rule change (SR-NASDAQ-2015-144), be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.³⁸

Robert W. Errett,
Deputy Secretary.

³⁵ See proposed Exchange Rule 5810(c)(2)(A)(iii); see also supra note 21.

³⁶ See Notice, supra note 5, at 81575.

³⁷ 15 U.S.C. 78f(b)(2).

³⁸ 17 CFR 200.30-3(a)(12).

